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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY _____ DEPUTY

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10 *Attorneys for Plaintiff*

11 UNITED STATES DISTRICT COURT
12 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

14 RANDY NUNEZ, on Behalf of Himself, and)
All Others Similarly Situated.)

Case No. **07 CV 2209**

L (WMC)

15 Plaintiff,)

CLASS ACTION

16 vs.)

COMPLAINT FOR DAMAGES AND
EQUITABLE RELIEF

17 MICROSOFT CORPORATION, a)
18 Washington corporation, and BUNGIE,)
L.L.C., a Delaware Limited Liability)
19 Company.)

1. Breach of Statutory Implied
Warranty of Merchantability;
2. Breach of Statutory Implied
Warranty of Fitness for a Particular
Purpose
3. Violation of Cal. Bus. & Prof. Code
Section 17200

20 Defendants)

Demand for Jury Trial

24
25 Plaintiff RANDY NUNEZ ("Nunez"), by and through his undersigned attorneys, based
26 on his individual experience and the investigation of counsel, alleges on behalf of himself and on
27 on behalf of the proposed plaintiff Class as defined herein against Defendants MICROSOFT
28

1 CORPORATION (hereinafter individually referred to as “Microsoft”) and BUNGIE L.L.C.
2 (hereinafter individually referred to as “Bungie”) as follows:

3
4 **NATURE OF THE ACTION**

5 1. Microsoft and Bungie (collectively referred to as “Defendants”) manufacture a “first
6 person” science fiction video game (“*Halo 3*”) made and sold for exclusive use on Microsoft’s video
7 game console (the “Xbox 360”). The container in which Halo 3 is sold expressly states that Halo 3
8 is compatible with the Xbox 360.

9 2. Defendants knew or had reason to know that *Halo 3* was being purchased by
10 consumers for use on an Xbox 360, and that the buyers of *Halo 3* were relying on Defendants’ skill
11 and judgment to furnish goods suitable for that purpose.

12 3. Since the release of *Halo 3* in September 2007, tens of thousands of the *Halo 3*
13 video game have been sold to California consumers.

14 4. However, *Halo 3* does not function with the Xbox 360, and to the contrary, attempted
15 use of *Halo 3* consistently causes the Xbox 360 to “crash,” “freeze” or “lock up” while the game is
16 being played.

17 5. Although faced with repeated and mounting consumer complaints and inquiries
18 concerning this operational flaw in the *Halo 3*, Defendants have failed to recall *Halo 3* or otherwise
19 remedy its failure to function on the Xbox 360.

20 6. Under California statutory law, the Song-Beverly Consumer Warranty Act (Civ. Code
21 Sec 1790 *et seq.*), Defendants as manufacturers of *Halo 3* impliedly warrant:

- 22 a. that *Halo 3* is merchantable, that is, that *Halo 3* (i) is fit for
23 the ordinary purpose of operating on the Xbox 360, and (ii)
24 conforms to the affirmations of fact made on the *Halo 3*
25 container; and
26 b. that *Halo 3* is fit for the particular purpose of being played
27 on the Xbox 360.

28 Cal Civ. Code §1791.1(a).

1 7. Because *Halo 3* is not fit for either its ordinary purpose or for the particular purpose
2 for which it was sold, Defendants have breached the statutorily implied warranties of the Song-
3 Beverly Consumer Warranty Act.

4 8. Nunez brings this action as a California class action on behalf of himself and all other
5 similarly situated California consumers that have purchased the Product, for all relief authorized
6 under Cal. Civ. Code §1791.1(d) and §1794(a), including the rights of replacement or reimbursement
7 provided for under Cal. Civ. Code §1794(b).

8 9. The Song-Beverly Consumer Warranty Act is manifestly a remedial measure,
9 intended for the protection of the consumer, which should be given a construction calculated to bring
10 its benefits into action. *Robertson v. Fleetwood Travel Trailers of California, Inc.*, 50 Cal. Rptr. 3d
11 731, 144 Cal. App. 4th 785 (App. 5 Dist. 2006). The Song-Beverly Consumer Warranty Act was
12 intended to broaden the remedies set out in the California Commercial Code. *Mocek v. Alfa Leisure,*
13 *Inc.*, 7 Cal. Rptr. 3d 546, 114 Cal. App. 4th 402 (App. 4 Dist. 2003).

14 10. Any waiver by the buyer of consumer goods of the provisions of the Song-Beverly
15 Consumer Warranty Act, except as expressly provided in the Act, is “deemed contrary to public
16 policy and shall be unenforceable” pursuant to Cal. Civil Code §1790.1.

17 11. The remedies provided by the Song-Beverly Consumer Warranty Act are cumulative,
18 and do not in particular supplant the provisions of the Unfair Practices Act, Business and Professions
19 Code §17200 et seq. Cal. Civ. Code §1790.4.

20 12. Furthermore, Defendants’ statutory violations and other acts, omissions,
21 misrepresentations, practices and non-disclosures, as alleged herein, also constitute “unlawful,” and
22 “unfair” business acts and practices within the meaning of Cal. Bus. & Prof. Code §§17200, et seq.

23 PARTIES

24 13. Microsoft is incorporated under the laws of the State of Washington and maintains its
25 principal executive offices at One Microsoft Way, Redmond, Washington. Microsoft is responsible
26 for the manufacture and sale of *Halo 3*.

1 14. Bungie is incorporated under the laws of the State of Delaware and maintains its
2 principle executive offices at 434 Kirkland Way, Kirkland, Washington. Bungie is also responsible
3 for the manufacture and sale of *Halo 3*.

4 15. Nunez resides in the County of San Diego, State of California.

5 16. At all times herein mentioned, there existed a unity of interest in ownership between
6 the Defendants such that any individuality and separateness between them with respect to the
7 manufacture and sale of *Halo 3* has ceased.

8 JURISDICTION AND VENUE

9 17. This Court has jurisdiction over this matter pursuant to the 15 U.S.C. §1121 and
10 subject matter jurisdiction pursuant to 28 U.S.C. §1332(a)(1) and (d)(2)(A), in that this action seeks
11 monetary relief in excess of \$5,000,000, exclusive of costs and attorneys' fees and interest and is
12 between citizens of different states.

13 18. This Court has jurisdiction over Microsoft, a Washington corporation, because it is
14 authorized to conduct business in California and has intentionally availed itself of the laws and
15 markets of California in the promotion and marketing of its video games, including *Halo 3*, in
16 California.

17 19. This Court has jurisdiction over Bungie, a Delaware corporation, because it is
18 authorized to conduct business in California and has intentionally availed itself of the laws and
19 markets of California in the promotion and marketing of *Halo 3* in California.

20 20. Venue is proper within this District pursuant to 28 U.S.C. §1391(b)(2) because
21 Defendants both conduct substantial business in this County and Nunez resides in this County.
22 Venue is also proper in this Court because a substantial part of the acts and practices giving rise to
23 Nunez's claims occurred or will occur in this County. Defendants have received substantial
24 compensation from their sale of the *Halo 3* product in this County, and Nunez in particular
25 purchased his *Halo 3* in this County.

26 GENERAL ALLEGATIONS

27 21. "Halo" video games are a series of science fiction games originally created by Bungie
28 Software Products Corporation, which was acquired by Microsoft in May 1991. *Halo 3*, the third

1 edition of the game, is designed, manufactured, marketed, and sold by Defendants to be played
2 exclusively on the Xbox 360 video game console.

3 22. The story line of the *Halo 3* video game builds upon the previous version of the Halo
4 series of video games. The first Halo video game, entitled "*Halo: Combat Evolved*," was released in
5 November of 2001 exclusively for the Xbox gaming system. Following the success of the original
6 game, Microsoft released the second Halo video game, entitled "*Halo 2*" in November of 2004. The
7 game's sales generated over \$125 million dollars on its premiere day, making it the fastest selling
8 U.S. media product in history. (See "Microsoft raises estimated first day *Halo 2* sales to \$125
9 million-plus," Tor Thorsen, *Gamespot*, Nov. 10, 2004;
10 http://www.gamespot.com/news/2004/11/10/news_6112915.html (last viewed on November 10,
11 2007).) As of August 30, 2007, 8 million units of the game have been sold worldwide." (See "Grand
12 Theft Auto, *Halo 3* headed to Xbox 360," Chris Morris, *CNNMoney.com* May 9, 2006;
13 http://money.cnn.com/2006/05/09/technology/e3_microsoft/index.htm (last viewed on November 10,
14 2007).)

15 23. On September 25, 2007, Microsoft released *Halo 3*, generating over \$170 million in
16 sales in the first 24 hours following its release. Microsoft reported that worldwide sales of over \$300
17 million in the first week of its release. (See "Microsoft says 'Halo' 1st-week sales were \$300
18 million," *San Francisco Reuters*, October 4, 2007;
19 <http://uk.reuters.com/article/technologyNews/idUKN0438777720071005> (last viewed on November
20 10, 2007).)

21 24. On October 1, 2007, six days following the release of *Halo 3*, Bungie split from
22 Microsoft and became a privately held limited liability company. On information and belief,
23 Microsoft retains an ownership interest in Bungie, and Defendants collectively continue to
24 manufacture and sell the *Halo 3*.

25 25. At all time herein mentioned, Defendants manufactured, marketed, advertised, and
26 represented on the *Halo 3* product packaging that the *Halo 3* video game was compatible with
27 Microsoft's Xbox 360 video game console. (See Product Packaging attached as Exhibit, "A") The
28 front of the product packaging represents "Only on XBOX 360" and the back of the packaging

1 represents that *Halo 3* is for exclusive use on the Xbox 360 in the NTSC format, representing the
2 format for all Xbox 360 consoles sold for use in the United States.

3 26. Defendants thus unquestionably knew or had reason to know that *Halo 3* was being
4 purchased by consumers for use on an Xbox 360, and that the buyers of *Halo 3* were relying on
5 Defendants' skill and judgment to furnish goods suitable for that purpose.

6 27. After consumers, including Mr. Nunez, inserted the *Halo 3* video game into their
7 respective Xbox 360 video game consoles and began game play, however, the *Halo 3* video game
8 routinely, consistently, and systematically "froze," "crashed" or "locked up" – disrupting game play
9 and rendering the game inoperable.

10 28. Many consumers have reported that the *Halo 3* video game has caused their Xbox
11 video game consoles to crash and remain totally inoperable after playing the *Halo 3* video game.
12 Manifold recent consumer complaints on industry Internet websites, weblogs and message boards
13 reflect the existence of the design and/or manufacturing defect in the Defendants' *Halo 3* video game

14 29. Defendants have also received numerous complaints directly from their customer
15 service forums on-line, directly from consumers of the game via their telephone customer service
16 line, and in writing. However, Defendants have failed to acknowledge the propensity of *Halo 3* to
17 freeze, lock up and/or crash the Xbox 360.

18 NUNEZ'S PURCHASE OF *HALO 3*

19 30. Nunez purchased the *Halo 3* video game on or around the middle of October, 2007 at
20 "Gamestop," a video game retail store located at 530 Horton Plaza, San Diego, California 92101.

21 31. Defendants knew or had reason to know that *Halo 3* was being purchased by Nunez
22 for use on an Xbox 360, and that Nunez was relying on Defendants' skill and judgment to furnish
23 goods suitable for that purpose.

24 32. Nunez paid \$59.99, plus tax, for *Halo 3*.

25 33. Following his purchase of the *Halo 3* video game, Nunez attempted to play it on his
26 Xbox 360 video game console. However, Nunez's *Halo 3* video game repeatedly locked up, froze
27 and/or crashed while being operated on Mr. Nunez's Xbox 360 game console.

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CLASS ALLEGATIONS

34. Nunez brings this action pursuant to Fed. R. Civ. P. 23(b)(2) and/or (b)(3), on behalf of all California consumers who, at any time from August of 2007 and the date of class certification, purchased the *Halo 3* video game. Excluded from the class are Defendants and any of their officers, predecessors, successors, directors, affiliates and employees.

35. The Class is so numerous that joinder of their members is impracticable.

36. The exact number of Class members is unknown to Nunez at this time and can only be ascertained through appropriate discovery.

37. There are numerous questions of law and fact common to Nunez and the Class members as set forth above, including:

- Whether the implied warranty of merchantability under Cal. Civ. Code §1791.1 applies to *Halo 3*;
- Whether *Halo 3* as sold by Defendants is in fact merchantable within the meaning of Sec. Cal. Civ. Code §1791.1;
- Whether the implied warranty of fitness under Cal. Civ. Code §1791.1 applies to *Halo 3*
- Whether *Halo 3* as sold by Defendants is in fact fit for a particular purpose within the meaning of Sec. Cal. Civ. Code §1791.1;
- Whether Defendants breached the implied warranty of merchantability;
- Whether Defendants breached the implied warranty of fitness;
- Whether purchasers of *Halo 3* are entitled to damages under Cal. Civ. Code §1794; and
- Whether purchasers of *Halo 3* are entitled to other alternative forms of relief under Cal. Civ. Code §1794;
- Whether Defendants' business acts and practices violated Cal. Bus. & Prof. Code §§17200 et seq.;
- Whether Nunez and the Class are entitled to injunctive, declaratory and other equitable relief under Cal. Bus. & Prof. Code §§17200 et seq..

1 38. Nunez's claims are typical of the claims of the Class members. If brought and
2 prosecuted individually, the claims of each Class member would require proof of many of the same
3 material and substantive facts, rely upon the same remedial theories and seek the same relief.

4 39. Nunez's claims are sufficiently aligned with the interests of the absent Class members
5 to ensure that the Class claims will be prosecuted with diligence and care by Nunez as
6 representatives of the Class.

7 40. Nunez will fairly and adequately protect the interests of the Class and have no
8 interests antagonistic to those of the other Class members.

9 41. Nunez is willing and prepared to serve the Court and proposed Class in a
10 representative capacity with all the obligations and duties material thereto.

11 42. Nunez has retained attorneys experienced in class actions and complex litigation as
12 counsel.

13 43. Class certification is appropriate under Fed. R. Civ. P. 23(b)(2) in that Defendants
14 have acted or refused to act on grounds generally applicable to the Class, making final declaratory or
15 injunctive relief appropriate.

16 44. Class certification is appropriate under Fed. R. Civ. P. 23(b)(3) in that common
17 questions of law and fact predominate over any questions affecting only individual members.

18 45. A class action is superior to other available methods for the fair and efficient
19 adjudication of this controversy for at least the following reasons:

- 20 • Given the size of individual Class members' claims and the expense of litigating
21 those claims, few, if any, Class members could afford to or would seek legal redress
22 individually for the wrongs Defendants have committed against them, and absent
23 Class members have no substantial interest in controlling the prosecution of
24 individual actions;
- 25 • This action will promote an orderly and expeditious administration and adjudication
26 of the Class's claims;
- 27 • Economies of time, effort and resources will be fostered and uniformity of decisions
28 will be ensured; and

1 55. Pursuant to Cal. Civ. Code §1791(d) and §1794(a), Nunez and the Class are entitled
2 to damages and other legal and equitable relief including, at their election, the rights of replacement
3 and reimbursement.

4 **COUNT 2:**
5 **BREACH OF IMPLIED WARRANTY OF FITNESS**
6 **(VIOLATION OF THE SONG-BEVERLY CONSUMER WARRANTY ACT,**
7 **CAL. CIV. CODE §1791.1(b))**

8 56. Nunez re-alleges and incorporates by reference the allegations contained in the
9 paragraphs above as if fully set forth herewith.

10 57. Defendants impliedly warranted to Nunez and the Class that *Halo 3* was fit for the
11 particular purpose of being operated on the Xbox 360 within the meaning of Cal. Civ. Code
12 §§1791.1(b).

13 58. Defendants knew or had reason to know that *Halo 3* was being purchased by Nunez
14 and the Class for use on an Xbox 360, and that the buyers of *Halo 3* were relying on Defendants'
15 skill and judgment to furnish goods suitable for that purpose.

16 59. Defendants have breached the implied warranty of fitness, because the *Halo 3* video
17 games freeze, lock up and/or crash the Xbox 360 video game console when operated in their
18 particular purpose of use on the Xbox 360. Defendants continue to breach the implied warranty of
19 fitness to this day because they have failed to correct the defect in *Halo 3*.

20 60. As a proximate result of Defendants' breach of the implied warranty of fitness, Nunez
21 and the Class sustained damages including, but not limited to, the purchase price of *Halo 3*.

22 61. Pursuant to Cal. Civ. Code §1791(d) and §1794(a), Nunez and the Class are entitled
23 to damages and other legal and equitable relief including, at their election, the rights of replacement
24 and reimbursement.

25 **COUNT 3:**
26 **CALIFORNIA UNFAIR COMPETITION LAW**
27 **(VIOLATION OF CAL. BUSINESS & PROFESSIONS CODE §§ 17200)**

28 62. Nunez re-alleges and incorporates by reference the allegations contained in the
paragraphs above as if fully set forth herewith.

1 63. The conduct alleged in this complaint constitutes unlawful and unfair business acts
2 and practices within the meaning of the California Unfair Competition Law, §§17200, *et seq.* of the
3 California Business and Professions Code. Nunez and the Class have suffered injury in fact and lost
4 money or property as a result of Defendants' violations of law and wrongful conduct.

5 64. Defendants' actions are unlawful and unfair because they have violated, *inter alia*, the
6 Song-Beverly Act, and because in their pursuit of profit, Defendants have made their product
7 defective and inoperable in its intended use.

8 65. Defendants' actions are unfair because they did not inform the purchasers of their
9 product that the *Halo 3* video game freezes, locks up and/or crashes when it is utilized in its intended
10 use on Defendant Microsoft's Xbox 360 video game console. Defendants have deceived consumers
11 who reasonably believed that the *Halo 3* video game would perform reliably in its intended use and
12 permit purchasers to play the video game without substantial interruption.

13 66. Defendants' acts, omissions, misrepresentations, practices and non-disclosures, as
14 alleged herein, also constitute "unfair" business acts and practices within the meaning of Cal. Bus. &
15 Prof. Code §§17200, *et seq.* Defendants' practices offend public policy and are unethical,
16 oppressive, unscrupulous, and violate the laws stated. Defendants' conduct caused and continues to
17 cause substantial injury to consumers, including Nunez and the Class and was not reasonably
18 avoidable by the consumers themselves. The gravity of Defendant's alleged wrongful conduct
19 outweighs any purported benefits attributable to such conduct. There also were reasonably available
20 alternatives to the Defendants to further their business interests other than the wrongful practices
21 described herein. As a result, Defendants engaged in unfair business practices prohibited by Cal.
22 Bus. & Prof. Code §17200, *et seq.* Finally, Defendants' conduct, acts and omissions violate public
23 policy against sharp and deceptive practices, false advertising, fraud and deception.

24 67. Defendants' acts, omissions, misrepresentations, practices and non-disclosures, as
25 alleged herein, also constitute "fraudulent" business acts or practices within the meaning of Cal. Bus.
26 & Prof. Code §17200. Defendants' misrepresentations, non-disclosures and concealments were
27 false, misleading, untrue, deceptive and likely to deceive and in fact did deceive Nunez and members
28

1 of the class. Defendants either knew, recklessly disregarded, or should have known their product
2 representations were untrue and/or misleading.

3 68. Accordingly, Defendants have violated the Unfair Competition Law's proscription
4 against engaging in unlawful, unfair, and fraudulent business practices.

5 69. As a result of this unlawful, unfair, and fraudulent conduct, Nunez and other members
6 of the Class have been damaged.

7 70. Defendants' conduct is continuing and unless equitable relief is granted, the sale of
8 *Halo 3* video games for exclusive use on Xbox 360 game consoles will continue unabated.

9 71. Defendants are in addition liable for restitutionary disgorgement and all other relief
10 available under California law to remedy violations of §17200.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, PLAINTIFF AND THE CLASS pray for judgment and relief as follows:

13 A. For an Order that this action may be maintained as a class action pursuant to Rule
14 23(b)(2) of the *Federal Rules of Civil Procedure* with respect to Nunez's claims for equitable relief,
15 and Rule 23(b)(3) of the *Federal Rules of Civil Procedure* with respect to Nunez's incidental claims
16 for damages and other monetary relief, and declaring Nunez as representative of the Class and his
17 counsel as counsel for the Class;

18 B. For an Order determining that the conduct alleged herein violates the Song-Beverly
19 Consumer Warranty Act and entering appropriate monetary and equitable relief pursuant to that law;

20 C. For an Order determining that the conduct alleged herein violates the California
21 Unfair Competition Law, §§17200, *et seq.* of the California Business and Professions Code and
22 entering appropriate monetary and equitable relief pursuant to that law;

23 D. For costs of suit, including reasonable attorneys' fees, and pre- and post-judgment
24 interest;

25 E. For such other, further, and different relief as the nature of the case may require or as
26 may be determined to be just, equitable, and proper by this Court.

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1 DATED: November 20, 2007

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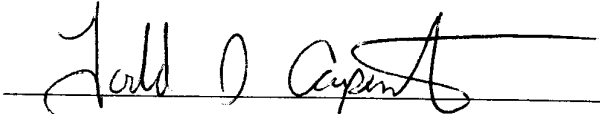
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JURY TRIAL DEMAND

Nunez demands a trial by jury on all issues so triable.

DATED: November 20, 2007



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